

Service Date: October 19, 2000

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

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|                                  |   |                         |
|----------------------------------|---|-------------------------|
| IN THE MATTER OF MACKENZIE       | ) | TRANSPORTATION DIVISION |
| DISPOSAL, INC., PSC No. 9265,    | ) |                         |
| Complaint by Montana Solid Waste | ) | DOCKET NO. T-00.4.COM   |
| Contractors and Browning-Ferris  | ) |                         |
| Waste Systems of Montana         | ) | ORDER NO. 6492          |

PROPOSED ORDER DISMISSING COMPLAINT

NOTE: This order is a proposed order of the PSC. The parties to this proceeding (i.e., SWC, BFI, and MacKenzie) may file objections to this proposed order within 20 days of the service date above. Objections must be accompanied by supporting arguments. Responses to objections must be filed within 10 days of PSC receipt of the objections and must also be accompanied by supporting arguments.

INTRODUCTION

1. On January 14, 2000, the Montana Solid Waste Contracts (SWC) and Browning Ferris Waste Systems of Montana (BFI) filed a complaint before the Public Service Commission (PSC) against MacKenzie Disposal Service, Inc. (MacKenzie), a Class D (solid waste) carrier operating in the Billings area. On January 31, 2000, SWC and BFI filed an amended complaint against MacKenzie.

2. In the complaint as amended (complaint) SWC and BFI challenge the validity of MacKenzie's Class D permit (PSC No. 9265), which recently had been acquired by MacKenzie through a transfer approved by the PSC over protest of BFI in PSC Docket No. T-99.25.ST. In the complaint SWC and BFI make four claims: (a) the authority now held by MacKenzie was originally issued in violation of Montana laws applicable to the 1977 conversion of property authorities to solid waste authorities; (b) the previous owners of the authority and MacKenzie, as present owner of the authority, have not complied with use-it-or-lose-it laws governing Class D carriers; (c) MacKenzie did not meet the requirement to commence actual operations within

30 days of approval of the transfer of authority; and (d) MacKenzie's present operations under the authority in issue, operations which are competing with BFI for Billings-area customers, are outside the scope of MacKenzie's Class D authority.

3. The PSC has not yet issued a formal notice of the SWC / BFI complaint to MacKenzie. However, the PSC has provided MacKenzie with a copy of the complaint and the amended complaint and related correspondence indicating that the validity of the authority held by MacKenzie may be at risk. The PSC now determines, on its own motion, that the SWC / BFI complaint against MacKenzie should be dismissed for the reasons expressed in the following discussion.

### DISCUSSION

#### Validity of Authority in Regard to Initial Grant

4. SWC and BFI claim that Class D motor carrier authority now held by MacKenzie was originally issued in violation of laws which applied to the conversion or spin-off of property authorities to Class D authorities in 1977. The PSC determines that this SWC / BFI claim should be dismissed.

5. The authority now held by MacKenzie, PSC No. 9265, is believed to be based on a property authority issued in 1929 to Great Falls Transfer and Storage Company (Great Falls Transfer), as amended from time to time and as Great Falls Transfer later merged or otherwise became affiliated with Suhr Transport (Suhr) and later became Suhr. In 1977 all or a part of the underlying property authority then held by Suhr was spun-off to create the Class D authority now in issue. Since its creation in 1977 the Suhr Class-D authority has been transferred several times. It appears from PSC records that the authority was leased and then transferred from Suhr to Jim's Excavating Service, Inc., in 1991, then transferred to WWSS Associates, Inc., dba Big Sky Industrial, in 1993, and then transferred to MacKenzie in 1999.

6. From 1977 to the present the authority has been deemed valid by the PSC, the initial owner, and the three subsequent owners, including MacKenzie. During this time the validity of the authority in regard to events surrounding its initial grant has not been questioned

or challenged. Under these circumstances the PSC determines that it will not, on its own motion or on request, attempt to engage in any procedure pertaining to the validity of the authority based on claims relating to the initial grant, which must ultimately be based on the reconstruction of events, if accurate reconstruction is even possible, occurring nearly one-quarter of a century ago. Even if it could be established that the authority was initially issued in violation of legal requirements, in no reasonable context under the circumstances present could invalidation of the authority on that basis be viewed as fair, equitable, or just from any practical or legal standpoint.

#### Validity of Authority in Regard to Use-It-or-Lose-It Requirements

7. SWC and BFI claim that previous owners of MacKenzie's Class D motor carrier authority have not complied with laws which require Class D authorities to be actually used to remain valid (i.e., the "use-it-or-lose-it" provision applicable to Class D authorities). The PSC determines that this SWC / BFI claim should also be dismissed.

8. Montana statutes applicable to Class D motor carriers provide that a carrier may not possess a Class D certificate or operate as a Class D carrier unless the carrier is actually engaged in the transportation of garbage on a regular basis as a part of usual business operations. § 69-12-214(2), MCA. There is a presumption that a Class D carrier is actually engaged in the transportation of garbage on a regular basis as a part of usual business operations if the carrier demonstrates that service has been provided to at least 20 customers per month during each month of a calendar year or that service has generated at least \$5,000 gross revenue during the calendar year. ARM 38.3.1203. In certain instances a carrier may file before the PSC a verified statement of circumstances (e.g., seasonal operations) which the carrier believes should allow an authority to be retained even though the minimum requirements for operations are not met. ARM 38.3.1204. Carriers are required to file an annual report related to the above requirements. ARM 38.3.1205.

9. The authority in issue has existed for many years and has changed ownership several times during that period. The SWC / BFI claims reference use-it-or-lose-it events as far back as 1981. During this period the authority has been deemed in compliance with the

applicable use-it-or-lose-it requirements by the PSC, the initial owner, and the three subsequent owners, including MacKenzie, and the validity of the authority in regard to use-it-or-lose-it requirements has not been previously questioned or challenged. The PSC determines that review based on the SWC / BFI complaint should be limited to the previous five years (i.e., operations in the years 1995 through 1999). Even if it could be established that owners of the authority did not meet the Class D use-it-or-lose it requirements prior to the previous five years, in no reasonable context under the circumstances present could invalidation of the authority be viewed as fair, equitable, or just from any practical or legal standpoint.

10. According to PSC records the certificate has met compliance with the use-it-or-lose-it requirements of Montana law during the previous five years. For calendar years 1995, 1996, and 1998 the annual reports pertaining to PSC No. 9265 include revenues above the \$5,000 minimum required. In these years compliance was met. SWC and BFI note that these annual reports include no monthly list of customers. A list of customers is not required in regard to a showing based on annual revenues.

11. For calendar year 1997 the annual report includes no revenues. The next previous owner the MacKenzie authority, WWSS, requested suspension of the authority commencing December 1, 1997 (extending to June 1, 1998). SWC and BFI note that WWSS had conducted no operations in the preceding eleven months of 1997. SWC and BFI compute the total inactivity, inactivity plus period of suspension, as 17 months. However, during the reported year 1997 the PSC had granted a suspension, which it has authority to do pursuant to § 69-12-404, MCA. It is PSC policy pertaining to Class D carriers that annual reports pertaining to a reported year during which there was a suspension do not have to meet the calendar year minimum revenue requirements. Although reports for the year of suspension are required, for the purpose of maintaining a complete history of the authority, the revenues reported, if any, are partial-year and are not required to meet the calendar year minimum standards and may demonstrate zero revenues for the year. In any event, for reported year 1997 (report filed in 1998) the PSC accepted a verified statement in lieu of the minimum standards, which the PSC may do by rule.

ARM 38.3.1204. The inactivity of the authority in 1998 is immaterial. As noted above, the 1998 annual report pertaining to the authority shows revenues meeting the minimum requirements.

12. For calendar year 1999 the annual reports include no revenues, but in that year the authority changed ownership (from WWSS to MacKenzie). PSC policy is that "calendar year" in ARM 38.3.1203 and 38.3.1205 means the entire calendar year. Although reports for the year are required from the transferor and the transferee, for the purpose of maintaining a complete history of the authority, the revenues reported, if any, are partial-year and are not required to meet the calendar year minimum standards and may demonstrate zero revenues for the year.

#### Commencing Actual Operations Following Transfer of Authority

13. SWC and BFI assert that MacKenzie was required to begin actual operations within 30 days of the grant of authority, but did not do so. The PSC determines that this SWC / BFI claim should also be dismissed.

14. PSC rules require that within 30 days of the mailing of notice of PSC approval of a transfer the carrier must make a compliance filing. ARM 38.3.602. Then, within 30 days of the carrier's compliance filing the carrier must commence actual operations. *Id.* PSC records show that the PSC letter approving the transfer to MacKenzie was mailed to MacKenzie on November 22, 1999. PSC records show that MacKenzie met compliance within the required 30 days, by filing vehicle registration on December 14, 2000, and filing proof of liability insurance on December 22, 1999 (fax filing, with hard copy following December 27, 1999). The exact date MacKenzie commenced operations is not known, but believed to be in early January, 2000. The SWC / BFI amended complaint states, upon information and belief, that MacKenzie hauling commenced a few days after January 14, 2000. This would be in compliance with the PSC rule on commencing operations.

#### Scope of Authority and Current Operations

15. The SWC / BFI complaint against MacKenzie includes a claim that MacKenzie's operations in the Billings area are not within the scope of the authority held by MacKenzie and

are therefore not lawful operations. The PSC determines that this SWC / BFI claim should also be dismissed.

16. This claim centers on a now-resolved dispute over the meaning and effect of the landfill closure provision (a provision which exists within most Class D authorities, including MacKenzie's) as it applies to Class D authorities which have required termination points, which MacKenzie's authority does. On March 16, 2000 (following the filing of the SWC / BFI complaint) the PSC published a notice of public hearing on alternative proposed amendments to the PSC's existing landfill closure rule (ARM 38.3.130). In that rulemaking the proposed alternative amendment adopted by the PSC resulted in an interpretation of the landfill closure provision in such a way that MacKenzie's operations complained of by SWC and BFI are not beyond the scope of the MacKenzie authority and are therefore lawful operations.

#### ORDER

IT IS HEREBY ORDERED that the SWC and BFI complaint against MacKenzie is dismissed.

Done and dated this 3rd day of October, 2000, by a vote of 4-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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DAVE FISHER, Chair

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NANCY MCCAFFREE, Vice Chair

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GARY FELAND, Commissioner

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BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson  
Commission Secretary

(SEAL)

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Proposed Order Dismissing Complaint, in Docket T-00.4.COM has today been sent to all parties listed below.

MAILING DATE: October 19, 2000

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FOR THE COMMISSION

### FIRST CLASS:

(PSC No. 1581/2)

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### AS ITS INTEREST MAY APPEAR:

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